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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of decision: 03.12.2021

+ **FAO (COMM) 195/2021**

PARAMOUNT PESTICIDES LTD

.....Appellant

Through: Mr Rachit Batra, Advocate.

versus

CENTRAL WAREHOUSING CORPORATIONRespondent

Through: Mr K.K.Tyagi with Mr Iftekhar
Ahmad, Advocates.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MR. JUSTICE TALWANT SINGH

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J.: (ORAL)

CM APPL. 43313/2021

1. Allowed, subject to just exceptions.

FAO (COMM) 195/2021

2. This appeal has been filed under Section 37 of the Arbitration and Conciliation Act, 1996 [in short “the 1996 Act”].

2.1 The appeal is directed against the judgment dated 18.02.2021, rendered by the Learned District Judge, Commercial Court-02, South District, Saket Court, New Delhi.

2.2 The appellant before us was the original claimant before the Arbitral Tribunal.

2.3 The respondent i.e., Central Warehousing Corporation [in short ‘CWC’], not only defended the claim lodged by the appellant, but also went on to file a counter-claim.

2.4 The Arbitral Tribunal, *via* award dated 26.09.2019, awarded

Rs.65,306/- in favour of the appellant, and allowed the counter-claim to the extent of Rs.1,07,304/-. In addition to the above, the respondent was directed to refund to the appellant, the money deposited with it in the form of security deposit and EMD.

2.5 The Arbitral Tribunal had also indicated that, if payments towards the awarded amount(s) are not made within sixty days from the date of award, then interest @ 12% per annum will run on the awarded amount(s) from the date of the award till the date of payment. This direction for payment of interest applied to both the appellant i.e., the claimant, and the respondent i.e., the counter-claimant.

2.6. At this stage, it may be relevant to point out that the counter-claim was allowed in favour of the respondent qua cost incurred on account of the risk purchases made by it against defective supplies.

3. The broad facts, which are required to be noticed, to adjudicate upon the appeal are as follows:

3.1 The respondent/CWC floated an e-tender notice dated 14.02.2014, for supply of chemical/dunnage/equipment.

3.2 The appellant was awarded two supply orders.

3.3 The contract, concededly, included a clause, which guaranteed the viability of DDVP and Malathion for one year, commencing from the date of their manufacture.

3.4. The appellant, concededly, supplied, as was the requirement under the contract, the requisite chemicals i.e., Dichlorovos 76% EC and Malathion 50% EC [hereafter referred to as “DDVP” and “Malathion”]. Insofar as DDVP was concerned, supplies were to be made for the period spanning between 08.07.2014 and 07.07.2015, and insofar as Malathion was

concerned, supplies were to be made between 04.07.2014 and 03.07.2015.

3.5. The contract also provided for extension time for performance by two months, in case, it was not terminated.

3.6. It is not in dispute that supplies were made to the designated locations. It is also not in dispute that, under the contract, the appellant supplied a total of 7800 litres of DDVP and 4850 litres of Malathion.

3.7. However, supplies made by the appellant against two indents, dated 10.12.2014 and 08.12.2014 concerning 2000 litres each, of Malathion and DDVP respectively, made to respondent's depot located in Hyderabad, encountered problems. The date of manufacturing of both DDVP and Malathion was November 2014, and hence, the guarantee period provided in the contract would expire in and about November 2015.

3.8. Since complaints were received from the users i.e., Food Corporation of India (FCI) and Department of Civil Supplies, for whom the supplies were requisitioned, a joint sample was taken; which resulted in a report being generated by National Institute of Plant Health Management, Hyderabad [in short "NIPHM"], dated 17.07.2015.

3.9. It is also not in dispute that, in the interregnum, 90% of the supplies made against the aforementioned indents had already been consumed i.e., utilized.

4. It is in these circumstances that the appellant made a claim for payment of dues, against the supplies made, which was denied by the respondent/CWC on the ground that the same did not conform to the specifications.

4.1. Since the dispute between the parties could not be settled, the matter was referred to the Arbitral Tribunal.

4.2 As noticed above, the Arbitral Tribunal partially allowed the claim of the appellant, and also allowed, to the extent indicated above, the counter-claim of the respondent.

4.3. Being aggrieved, the appellant filed a petition under Section 34 of the 1996 Act, with the concerned District Court.

4.4. Several contentions were raised, including the contention that principle of estoppel would operate, since 90% of the supplies had already been consumed.

4.5. It was also contended by the appellant that, before delivery, the respondent had conducted an inspection and taken samples, and since they were found fit, the supplies were accepted.

4.6. Furthermore, it is contended by the counsel for the appellant that the inspection was not carried out, in terms of the contract entered into between the parties.

5. We may also note that, since in the joint sample drawn it was found by NIHPM that the DDVP and Malathion supplies did not have the requisite active ingredients, the appellant replaced the unused quantity. Importantly, from the replaced samples as well, a “joint sample” was drawn. The joint sample drawn was tested by NABL accredited laboratories. The test revealed that the fresh replaced supplies conformed to the ISI specifications.

5.1. The Learned District Judge by way of a detailed judgment, after examining the pros and cons, and bearing in mind the parameters for adjudicating upon a Section 34 petition, reached the following crucial conclusions:

“CONCLUSIONS:

26. The challenge by petitioner to the impugned award of the learned arbitral tribunal has, therefore, to be examined in the

light of the above principles. It is a matter of record that on receiving unsatisfactory Report from its Regional Office, Hyderabad about the quality of chemical supplied by the petitioner, the Corporate Office of the respondent gave instructions on 05.06.2015 to arrange 'joint sampling' of available chemicals at Hyderabad to be tested again from a NABL accredited laboratory. It is noteworthy that in the presence of representatives of both the parties samples of these chemicals were drawn and sent to the National Institute of Plant Health Management (NIPHM), Rajendra Nagar (Hyderabad) on 30.06.2015. The NIPHM issued its Reports dated 17.07.2015 revealing that the active ingredient of Malathion 50% EC was only 26.95% as against the specification of 48.5% - 52.5%, and active ingredient of DDVP 76% EC was only 16.84% as against the specification of 72.2% - 79.8%.

27. Perusal of record shows that on receipt of these Reports, the respondent informed the same to the petitioner vide its letter dated 10.08.2015 and expressed its concern and also about the factum of purchasing of chemicals from other suppliers at the risk and costs of the petitioner and deduct the differential costs from the bills of the petitioner. Subsequently the petitioner in its letter dated 21.11.2015 admitted to replace the existing quantity of Malathion and DDVP at its cost and requested the respondent to return the existing quantity of these chemicals. Thereafter the petitioner replaced the existing chemicals. Thereafter the 'joint sample' drawn from the replaced and sent for laboratory testing to the First Source Laboratory Solutions LLP, Hyderabad and 'joint sample' of replaced Malathion was sent for laboratory testing to the Vitro Labs, Hyderabad-NABL accredited laboratories. The Labs' Reports dated 24.02.2016 & 23.03.2016 of replaced DDVP and Malathion respectively from these above NABL accredited laboratories showed that tested samples conform to the ISI specifications and from these Lab Reports it became clear that chemicals earlier supplied by the petitioner were of sub-standard in nature and were therefore treated as "no

supply" by the respondent, who was not liable to pay for the defective chemicals supplied by the petitioner and respondent was entitled to claim damages from the petitioner for alternative arrangements made by RO, Hyderabad of CWC.....”

5.2 The record would show that the report dated 17.07.2015 generated by NIPHM, was not assailed by the appellant.

5.3. It is also not in dispute that, upon a red flag being raised concerning the supplies made under the aforementioned indents, the unconsumed quantity was replaced by the appellant.

5.4. It is after considering these crucial facts that the Arbitral Tribunal concluded that the appellant's claim could only be allowed, to the extent of quantities replaced by it. The record shows that the appellant replaced 158.73 litres of Malathion and 113.30 litres of DDVP.

6. According to us, the submission made by the appellant before us that the principle of estoppel would apply, is completely misconceived in the facts and circumstances obtaining in the instant case.

6.1. The respondent could have known about the defects in the chemical supplies made only, when the product supplied was used by the concerned entities.

6.2. Pertinently, upon complaint being received the supplies received were inspected; a joint sample was drawn with the consent of the appellant which was examined by a third entity i.e., NIPHM. The report tendered by NIPHM revealed that the DDVP and Malathion supplied were of substandard quality. Once such a conclusion was reached that the supplies made did not adhere to the contract specifications, the appellant could not have sought payments for the supplies utilized. The Arbitral Tribunal's findings on this

aspect of the matter read as follows:

“Point No. 2: *It is admittedly on record that the material after being consumed was found that the material supplied by the claimant were not as per standard and its quality was deteriorated as is evident from lab test reports dated 17.07.2015 which shows that the chemicals supplied by the claimant were deteriorated before completion of guaranteed period. The lab test was required when after using the material it was learnt that the material supplied were defective and accordingly the sample of material drawn in association with the claimant from unused quantity of material was sent for lab test on 30.06.2015. After receipt of the report the claimant instead of replacing the entire quantity of material had admittedly replaced the unused quantity which on lab test were found standard compliant. The argument of the claimant that since the respondent had used the material and has not returned the entire quantity has no force. The claimant at no stage challenged the lab test reports dated: 17-7-2015 even though the claimant was in possession of samples taken on 30-6-2015. Therefore, the claimant's argument that the material supplied by him was in consonance with the specifications mandated in the ARC even if assumed to be correct, the lab test report obtained clearly establish that it's quality had deteriorated within one year from the date of manufacture. In these circumstances, the claimant is not entitled to payment of the entire quantity of material as the claimant failed to replace the entire quantity of material found not up to standard after lab test report. The claimant is however entitled to replaced quantity of the material i.e. 113.30 liters DOVP 76% EC and 158.730 liters of Malathion 50% EC which were found standard compliant. Accordingly, the claim of the claimant is partly allowed i.e. DOVP 76% EC (113.3. x 299=33877) Malathion 50% EC (158.730 x 198=31429) and an award of Rs.65,306/ (Indian Rupees Sixty five thousand three hundred and six only) in favour of the claimant and against the respondent made.*

Further, since the contract stand completed, the security deposit and EMD deposited by the claimant with the respondent needs to be refunded to the claimant. It is ordered accordingly.”

6.3. Since the report dated 17.07.2015 was not assailed, the conclusion

reached by NIPHM remain unrebutted. Besides this, what is required to be borne in mind is that respondent had contracted to pay for supplies of particular specifications. The supplies consisted of chemicals i.e., DDVP and Malathion, which were purposed for preventing insect infestation of stored food grains. The fact that a part of the supplies was utilized, could not have bolstered the claim of the appellant, vis-à-vis supplies which had been already utilized, as their effectiveness was blunted since supplies did not meet the prescribed specification. The respondents at no point, impliedly or expressly, agreed to accept supplies which did not meet the required specifications, as that would impact the effectiveness of the chemicals/supplies in issue.

6.4. Although, not articulated precisely, the argument made by the appellant appears to be that the respondent is estopped from acting contrary to the terms of the contract. In other words, the submission appears to be in the nature of a contractual estoppel. As indicated above, the terms of the contract do not create any such estoppel against dormant/latent defects. The respondent could not have known of the defect, which was dormant and surfaced only, upon this sample being tested. Thus, the argument advanced that the respondent had to pay for the consumed supplies, would fail on this score as well.

6.5. The argument of the counsel for the appellant that inspection was carried out *qua* the product before it was supplied, in our view, would not help the appellant, for the reason that, out of the total quantity supplied by the appellant, the respondent has raised a red flag only with regard to 4000 litres [i.e., 2000 litres each of DDVP and Malathion]. The total quantity supplied by the appellant, as noticed above, was 12650 litres; which

included 7800 litres of DDVP and 4850 litres of Malathion.

6.6. Furthermore, it would be relevant to emphasise that there is no averment with regard to principle of estoppel, either in the statement of claim, filed before the arbitral tribunal, or in the Section 34 petition, filed with the District Court. This assertion has been made for the first time, before this Court.

7. In the given facts and circumstances of the case, at this juncture, we can only conclude that there was no deficiency found by the ultimate user with respect to 8650 litres of supplies received.

7.1. Therefore, the submissions raised, before us lie in the realm of pure appreciation of facts. There is no patent illegality, as has been attempted to be projected before us.

7.2. Therefore, we find no reason to interfere with the impugned judgment dated 18.02.2021.

8. The appeal is, accordingly, dismissed.

9. There shall be no order as to costs.

(RAJIV SHAKDHER)
JUDGE

(TALWANT SINGH)
JUDGE

DECEMBER 03, 2021/tr

Click here to check corrigendum, if any